Filed 11/16/09 P. v. Stewart CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN NELSON STEWART, Defendant and Appellant.	H033063 (Santa Clara County Super. Ct. No. CC762472

Appellant Marvin Stewart challenges the denial of presentence custody credits against his 10-year sentence for assault with a deadly weapon. In essence, he asserts that his parole was revoked for the same conduct as the new charge, so he is entitled to dual credits under *People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*). For reasons that follow, we disagree and affirm the judgment.

Facts and Proceedings Below[1]

On March 20, 2007, appellant stabbed "Victim Britt" with a box cutter causing a large laceration that ran from the victim's left shoulder down to the bottom of his back.

[1] The facts and background underlying appellant's assault conviction are taken from a report prepared by appellant's parole officer and the probation officer's report in this case.

At the time of the assault, appellant was serving a three-year parole term imposed for a prior conviction for possession of cocaine base.

The conditions of appellant's parole included a curfew, which required appellant to be in his residence between the hours of 8:00 p.m. and 6:00 a.m.; not changing his residence without informing the parole officer in advance; complying with the instructions of the parole officer; not engaging in conduct prohibited by law; and not possessing weapons.

On February 13, 2007, appellant's parole officer had instructed appellant to report on the third Wednesday of every month. On March 21, 2007, (the third Wednesday of the month) appellant did not report to his parole officer as instructed. One week later, on March 28, 2007, appellant's parole officer telephoned appellant's residence and was informed by appellant's father that appellant was not at home. The parole officer left a message with appellant's father instructing appellant to report that afternoon at 3 p.m. Shortly thereafter, a Detective "Miliken" contacted appellant's parole officer. The parole officer was informed that appellant had been involved in a stabbing. Detective Miliken told appellant's parole officer that "they" were going to go to appellant's residence and arrest him. Appellant did not report to his parole officer that day as instructed.

The following day, March 29, 2007, at about 7:20 a.m., appellant's parole officer telephoned appellant's residence and was told by appellant's father that appellant had not been home "in [the] last 3 nights." Appellant's parole officer noted, "per detective they'll arrest him on our warrant. Will issue warrant" and "Due to new criminal involvement and moving w[ith]o[ut] permission, [appellant] needs to be upgraded to HC."[2]

Officers from the San Jose Police Department arrested appellant on March 30, 2007, at his residence. That same day, a parole hold was placed on appellant. At a

[2] We take this to mean a higher level of supervision or possibly some type of home confinement.

hearing on April 17, 2007, appellant's parole was revoked and he was returned to custody for 12 months. The Board of Parole Hearings identified absconding parole supervision, violating curfew, and assault with a deadly weapon as reasons for revoking appellant's parole.

On June 8, 2007, the Santa Clara County District Attorney filed an information in which appellant was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). The information contained an allegation that appellant personally inflicted great bodily injury on the victim (§§ 12022.7, subd. (a), 1203, subd. (e)(3));[3] and that appellant had suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1172.12, two prior serious felony convictions (§§ 667, subd. (a), 1192.7), and had served two prior prison terms (§ 667.5, subd. (b)).

On April 1, 2008, appellant pleaded no contest to the assault charge and admitted one prior serious felony allegation and a prison prior allegation, in exchange for the court striking his two prior strike convictions, one prior serious felony allegation, one prior prison term allegation, the great bodily injury enhancement in the current case and a sentence of 10 years "no more, no less."

On May 30, 2008, the court sentenced appellant to a prison term of 10 years consisting of four years for the assault count, five years for the prior serious felony conviction (§ 667, subd. (a)), and one year for the prison prior (§ 667.5, subd. (b)), to be served consecutively. Prior to announcing sentence, the court heard a motion by defense counsel to award dual credits for time that appellant had served when his parole had been revoked. During the hearing on the motion, defense counsel stated by way of an offer of proof that appellant would testify that the reason he was not at his house for three days was because he knew the police were looking for him for the assault. Accordingly, defense counsel argued that "there would [not] have been any violation but for" the

---

[3] All undesignated section references are to the Penal Code.

assault. The court denied the motion and awarded appellant only 92 days credit (62 actual days and 30 days conduct credit) for time served in custody awaiting sentencing on the assault count.

On June 16, 2008, appellant filed a notice of appeal "based on the sentence or other matters occurring after the plea."

Discussion

Appellant contends that he offered to prove that the conduct underlying his sentence for assault was "in fact a 'but for' cause of his 12 month parole revocation sentence" such that he was entitled to custody credits for that period of time.[4]

In essence, appellant argues that his proffered evidence would have established that but for the commission of the assault he would not have absconded or violated his curfew. In other words, the curfew and absconding violations were not independent of the assault. Rather, if the assault had not occurred neither the absconding nor curfew violation would have occurred, and therefore "the assault was the strict cause of the other two."

Penal Code section 2900.5, subdivision (a) provides in pertinent part: "In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, . . . all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, . . . shall be credited upon his or her term of imprisonment . . . ." However, subdivision (b) specifies, "credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. . . ."

In *Bruner, supra*, 9 Cal.4th 1178, 1194, the California Supreme Court acknowledged that it is not always a straightforward matter to determine a defendant's

---

[4] The probation officer's report calculates that including the parole revocation sentence appellant would have been entitled to 588 days credit (392 actual days and 196 conduct credits).

entitlement to presentence credits under section 2900.5 where multiple proceedings are in play. For that reason, in order " 'to provide for section 2900.5 a construction which is faithful to its language, which produces fair and reasonable results in a majority of cases, and which can be readily understood and applied by trial courts' . . . ." (*id.* at p. 1195), the *Bruner* court developed a rule of strict causation for cases where the same conduct is implicated in multiple proceedings. Thus, the *Bruner* court held that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint." (*Bruner, supra,* 9 Cal.4th at pp. 1193-1194.) The *Bruner* court approved of a number of decisions which reasoned that a prisoner's "criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode. [Citations.]" (*Id.* at p. 1191.) To put it another way, "a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period." (*Ibid*.)

In *Bruner, supra,* 9 Cal.4th 1178, a warrant issued for the defendant's arrest for three alleged parole violations; absconding from parole supervision, theft of a credit card, and cocaine use based on a positive urine test. (*Id*. at p. 1181.) When parole agents served the warrant, they found rock cocaine in the defendant's possession. The defendant was cited for possession of cocaine and released on that charge on his own recognizance. Nonetheless, he remained in custody under a parole hold. The Board of Prison Terms revoked the defendant's parole based on the three alleged violations and his possession of cocaine, and imposed a prison term of 12 months. While the defendant was serving that term, he pleaded guilty to the charge that he possessed cocaine, and was sentenced to prison for 16 months. The trial court found that the defendant was not entitled to any presentence custody credits on the current charge. (*Id*. at pp. 1181-1182.) The defendant

appealed and the Court of Appeal agreed in part with the defendant that he was entitled to presentence custody credit, but only from the time of the formal parole revocation. (*Id*. at p. 1182.) The Supreme Court reversed the judgment of the Court of Appeal. (*Id*. at p. 1180.)

In *Bruner*, the Supreme Court acknowledged the potential unfairness of the strict causation rule it applied, but explained, "it arises from the limited purposes of the credit statute itself. The alternative is to allow endless duplicative credit against separately imposed terms of incarceration when it is not at all clear that the misconduct underlying these terms was related. . . . [S]uch credit windfalls are not within the contemplation of section 2900.5." (*Bruner, supra*, 9 Cal.4th at p. 1193.) Responding to the suggestion a rule of strict causation in these circumstances worked an undue hardship on defendants, the Court noted a "defendant's burden, while onerous, is not necessarily impossible" (*Id.* at p. 1193, fn. 10.)

Thus, a defendant in custody on multiple causes, such as parole violations and new charges, bears the burden of establishing that he is entitled to presentence custody credits. (*Bruner, supra,* 9 Cal.4th at pp. 1193-1194.)

Appellant argues that the trial court rejected his request for dual credits because the court concluded that his proffered testimony, even if credited, could not satisfy *Bruner's* strict causation test. Accordingly, he asserts that the matter should be remanded with directions to grant the requested credits or in the alternative, to permit him to present his proffered testimony.

The Attorney General counters that appellant was not entitled to presentence custody credits because his violations of parole were "multiple and unrelated." The Attorney General argues that appellant violated his parole in three different ways, each of which was significant and sufficient to revoke parole. Appellant does not dispute that he violated parole in three different ways, or that any one of the three ways was sufficient by itself to revoke his parole. He asserts, however, that the three ways were not independent

of each other; in essence they were related because the reason for his absconding and violating curfew was that he was aware he was sought by the police on the assault and was avoiding detention.

Appellant's argument is based on a misinterpretation of *Bruner's* term "unrelated" incidents of misconduct (*Bruner*, *supra*, 9 Cal.4th at p. 1193) and the "but for" test. The facts of *Bruner* illustrate that "unrelated" misconduct is conduct that occurred at a different time and place to the criminal offense. Here, as the record shows, the assault occurred on March 20. It was not until the next day that appellant violated his parole by failing to report to his parole officer and not until the following week that he again failed to report. Further, it was not until at least March 26 that appellant violated his parole by being out of his residence after 8 p.m.

Appellant's argument that he would not have violated his parole by not reporting to his parole officer and by staying away from his residence "but for" the assault is not well taken. Absconding and violating curfew are not part of the crime of assault. Whatever appellant's reasons were for absconding and violating his curfew, those reasons do not transmute his actions into related incidents of misconduct. Furthermore, the fact that appellant was arrested at his residence substantially undermines his argument that the absconding and violating curfew were related to the assault.

We find instructive *People v. Stump* (2009) 173 Cal.App.4th 1264 (*Stump*), on the application of *Bruner* to this case. In *Stump*, the defendant was convicted of driving under the influence of alcohol with a prior felony within 10 years (Veh. Code, § 23152, subd. (a)), and driving with a blood-alcohol content of at least .08 percent with a prior felony within 10 years (Veh. Code, § 23152, subd. (b)). He was arrested and taken into custody on July 16, 2006. At the time of his arrest he was on parole and he violated the terms of his parole by committing the two offenses and, at the time he committed those offenses, by drinking alcohol and driving without his parole officer's permission. (*Stump, supra,* 173 Cal.App.4th at p. 1268.)

The defendant remained in custody through the date of sentencing in May 2008, and he was arraigned "with respect to the July 16, 2006 incident" on December 20, 2006. (*Stump, supra,* 173 Cal.App.4th at p. 1268.) The court awarded credits for the period of December 20, 2006, through sentencing, but declined to grant credits for the defendant's period of custody from July 16, 2006, through December 20, 2006. (*Ibid.*)

On appeal, the defendant challenged the court's failure to award credits for the earlier period. That period of custody, he asserted, "was 'attributable to proceedings related to the same conduct for which' he was convicted" because "there was only one 'single, uninterrupted, incident of misconduct,' and '. . . a single episode of criminal behavior may [not] be parsed into separate acts in order to deny the award of credit for revocation custody. . . .' " (*Stump, supra,* 173 Cal.App.4th at pp. 1268, 1271.) The defendant "emphasize[d] the language of *Bruner* pertaining to 'unrelated incidents of misconduct.' " (*Id.* at p. 1271.)

The Fourth District Court of Appeal noted that *Bruner* was not "directly on point" because "[t]he decision in [that case], inasmuch as it addressed only a fact pattern with completely unrelated incidents--alleged parole violations and a subsequent cocaine possession--did not address a fact pattern such as the one before us, where all of the acts in question were temporally related." (*Stump, supra,* at p. 1271.) The question presented, the court stated, was "how the *Bruner* 'but for' test should be applied when a defendant engages in a course of illegal conduct, such as drunk driving, that encompasses certain independent acts, none of which would be illegal per se, but each of which happens to be a separate ground for a parole violation, such as driving (without parole officer permission), or consuming alcoholic beverages in any amount?" (*Ibid.*)

The court answered that question as follows: "In the case before us, the conduct for which defendant was arrested gave rise to two drunk driving charges (violations of Veh. Code § 23152, subds. (a), (b)). It is not the case that 'but for' a drunk driving charge defendant would have been free of parole revocation custody. He still would have been

held for driving, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. Likewise, he still would have been held for consuming alcohol, which is not necessarily a crime in and of itself but may be, and was here, a parole violation. [¶] Penal Code 'section 2900.5 did not intend to allow credit for a period of presentence restraint unless the *conduct* leading to the sentence was the *true and only unavoidable basis* for the earlier custody.' (*Bruner, supra,* 9 Cal.4th at p. 1192.) Here, the conduct of driving under the influence of alcohol, for which defendant was sentenced in the underlying action, was not the 'only unavoidable basis' for the custody. The act of driving without permission was a basis for the earlier custody. The act of drinking alcohol, irrespective of driving, was a basis for the earlier custody. ' "Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty." [Citation.]' (*Id.* at p. 1184.)" (*Stump, supra,* 173 Cal.App.4th at p. 1273.) Here the underlying crime and the parole violations were less "temporally related" (*id.,* at p. 1271) than they were in *Stump*.

Appellant would not have been free of custody "but for" the assault charge. Like *Stump,* this is not a case in which the conduct leading to the sentence was the "*true and only unavoidable basis*" for the period of custody in question. (*Bruner, supra,* 9 Cal.4th at p. 1192.) Despite appellant's attempt to argue that the absconding and curfew violations would not have happened if he had not committed the assault, appellant's argument fails because he did not and cannot establish he would have been free of parole revocation custody but for the assault charge.

Of course, appellant was free to introduce evidence that his parole would not have been violated "but for" the assault charge alone. He failed so to do. In the absence of an affirmative indication to the contrary, we must conclude that appellant would have been confined for the other parole violations regardless of the assault charge.

Accordingly we find no error with respect to the trial court's denial of appellant's request for custody credits against his 10-year sentence for assault with a deadly weapon.

Disposition

The judgment is affirmed.

_____

ELIA, J.

WE CONCUR:

_____

RUSHING, P. J.

_____

PREMO, J.